FILED
JUN 3 1957
JOHN T. FEY, Clerk

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1956

No. 1014

HERSCHEL S. GREEN and MADGE GREEN,
Petitioners,

v.

OSCAR L. GREEN, ROBERT A. GREEN,
QUENTIN L. GREEN and ALICE GREEN,
Respondents.

RESPONDENTS' ANSWER TO MOTION TO DISPENSE WITH PRINTING, INCORPORATE PRINTED TRANSCRIPT ON PRIOR CERTIORARI PROCEEDINGS AND OF EXTENSION OF TIME TO FILE COURT RECORD

AUGUST F. BRANDT
363 St. Clair Avenue,
Grosse Pointe 30, Michigan,
JACKSON R. HUTTON,
408 First National Bank Bldg.,
Danville, Illinois,
Attorneys for Respondents.

MOERS, INC., 905 HENRY ST., DETROIT, MICH.

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1956

No. 1014

HERSCHEL S. GREEN and MADGE GREEN,
Petitioners,

v.

OSCAR L. GREEN, ROBERT A. GREEN,
QUENTIN L. GREEN and ALICE GREEN,
Respondents.

RESPONDENTS' ANSWER TO MOTION TO DISPENSE WITH PRINTING, INCORPORATE PRINTED TRANSCRIPT ON PRIOR CERTIORARI PROCEEDINGS AND OF EXTENSION OF TIME TO FILE COURT RECORD

Now come the Respondents, OSCAR L. GREEN, ROBERT A. GREEN, QUENTIN L. GREEN and ALICE GREEN, by their attorneys, August F. Brandt and Jackson R. Hutton, and for Answer to Petitioners' Motion to Dispense with Printing, Incorporate Printed Transcript On Prior Certiorari Proceedings and for Extension of Time to File Trial Court Record, say:

1. That the nature of the litigation and its history up to May 3, 1956 is adequately set forth in *Green v. Green,*

218 F. 2d 130; 233 F. 2d 642 and *In re Green*, 8 Ill. App. 2d 264, appeal denied 7 Ill. 2d. As is stated by petitioners this cause was heretofore before the Supreme Court of the United States in Cause No. 670, in the nature of a Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit, denied in 349 U.S. 917, 75 S. Ct. 606, and Rehearing denied in 349 U.S. 948, 75 S. Ct. 871.

2. That the Master in Chancery, appointed by the United States District Court for the Eastern District of Illinois, on July 6, 1956, after twelve days of hearings, made findings of fact and conclusions of law that the Petitioner, Herschel S. Green, should be permanently removed as testamentary trustee of the Estate of James A. Green, Deceased, and the Estate of Martha Green, Deceased, because, between April 9, 1942 and October 27, 1952, inclusive, he wrongfully transferred to himself all of the net income of both trusts, except $793.74 paid to his Co-beneficiary, Oscar L. Green, entitled to equal participation in such net income, and Herschel S. Green should be charged with a total of $76,838.68, less certain credits.

3. That Herschel S. Green, in his aforesaid fiduciary capacity of testamentary trustee without bond, not only personally usurped practically the entire net income of both trust estates, as aforesaid, but also wilfully and deliberately stripped such trust estates of their personal assets, and on October 27, 1952, when he resigned as trustee of both trust estates, immediately after a hearing in the aforesaid District Court, he had no money on hand, and there was then a $2,202.35 U.S. Fiduciary Income Tax owing, which his successor-trustee, appointed by the District Court, had to assume and subsequently pay.

4. That on August 2, 1956, the aforesaid District Court entered its Order, Judgment and Decree sustaining and adopting the aforesaid findings of fact and conclusions of law of the Master in Chancery, and no timely appeal was ever taken therefrom.

5. That in view of the aforesaid undeniable facts, the complaint of petitioners (Motion, Par. 6) that all of the interest of Herschel S. Green in the two trust estates is tied up in this litigation, because the judgment in accounting is a lien on his income and principle interest therein, is without any merit whatever.

6. That all of the considerable litigation in this cause since October 27, 1952, including all appeals, has been necessitated or instituted by petitioners.

7. That any unbiased appraisal of such litigation will show that it directly resulted from the blind and stubborn refusal of Herschel S. Green to evaluate his position as trustee and recognize the fact that no principle is more settled than that a fiduciary will not be allowed to profit out of his administration of an estate, and that anyone who accepts a position as trustee is thereby placed in a fiduciary relationship and must observe the law which governs the high duty which they have agreed to perform.

8. That the claim of petitioners that they are now without funds necessary to their present and future livelihood, and they must borrow from friends until January 1958 (Motion, Par. 10), is hardly plausible considering the fact that, in addition to the aforesaid $76,838.68, all of their living expenses, including use of public utilities, gasoline and oil for their personal automobile, was also charged to and paid with trust funds from April 9, 1942 until November 1956, when they finally vacated the trust premises.

9. That in addition to the aforesaid avails from the trusts, both petitioners have heretofore received substantial salaries, fees and mileage allowances from the State of Illinois, not properly reflected by them in their Motion (Par. 8), and also book royalties, from which it can be conservatively estimated petitioners have realized upwards of $40,000.00, or a grand total of upwards of $116,838.68 during such period.

10. That, other than the cost of electioneering, as claimed by petitioners (Motion, Par. 9), living and other ordinary and necessary expenses are not peculiar to petitioners alone, but are also applicable to respondents, and the aforesaid $76,838.68 usurped by Herschel S. Green, as trustee is hardly comparable to the aforesaid $793.74 he paid his co-beneficiary, entitled under the terms of both trusts to an equal share of the net income.

11. That although petitioners claim they have been able to maintain this appeal by the help of friends who believe in the justice of their cause (Motion, Par. 13), the numerous and repetitious motions, petitions and five successive appeals to the United States Court of Appeals for the Seventh Circuit, instituted by petitioners after Herschel S. Green resigned as trustee as aforesaid, clearly reveal that in each instance, as now, the motivating purpose was not the pursuit of justice, but merely the desire to delay, and cause unwarranted expense and burden to respondents in the hope they would falter, whereby Herschel S. Green could then escape the penalty deserved for debasing the trust imposed in him by his deceased parents.

12. That in no one instance heretofore has any of the aforesaid numerous motions or petitions, except continuances, ever been granted by any court, State or Federal,

and in no instance has any of the aforesaid successive appeals been successfully maintained.

13. That the fact that all of the six successive attorneys, and/or firm of attorneys, heretofore employed by petitioners, have withdrawn from this litigation, as petitioners themselves have indicated in their last appeal, would seem to indicate that all such counsel apparently became convinced they could not in good conscience, as reputable attorneys, continue to represent a testamentary trustee who maintains that no court can substitute the will of any person over and above that of Herschel S. Green governing the distribution of trust funds, and that he, as trustee, has the right to indiscriminately commingle the funds of two separate and distinct trust estates under his control, without maintaining any proper record, and usurp all such combined funds to pay personal obligations whenever necessary, as has been conclusively determined to be a fact by the aforesaid Master in Chancery appointed by the United States District Court.

14. That although petitioners claim they have paid all appeal costs in all the appeals which they have taken (Motion, Par. 6), it is pertinent to note the transcribed statement of the United States District Judge during proceedings before him in this cause on December 7, 1956, a part of the record in their last appeal (Motion, Par. 15, 16), viz: "*No bond was filed on the second appeal.* * * * *He had that appeal without any bond, without any costs. And you know and I know that if Mr. Green—Herschel Green was a man of means and was liable—and a judgment could be collected from him he wouldn't be taking all these chances, and I don't think you fellows have been fair with this court in this proceeding.*"

15. That petitioners' motion to dispense with printing extremely material parts of the record is but a devious device, repeatedly resorted to by them heretofore in their numerous appeals, to improperly foister upon respondents costs properly chargeable to them, or to entirely avoid ready reference to evidence detrimental to their position. A proper record will show testimony misquoted, deliberate misstatements and numerous inferences unsupported by the facts on the part of petitioners. It will reveal the undeniable fact that Petitioner Madge Green now claims to own an undivided one-third (1/3) personal interest in trust lands acquired solely with trust funds, and no other money, antagonistic to respondents and plaintiffs who only claim as trust beneficiaries. Such fact is not disclosed by petitioners because it clearly refutes petitioners' contention that the only interest which Madge Green has in the suit is that of a life beneficiary, and that she should be realigned as a plaintiff, which would destroy diversity jurisdiction.

16. That on August 25, 1942, Herschel S. Green, as Executor of the Estate of Martha Green, Deceased, filed a verified inventory of such estate in the County Court of Crawford County, Illinois, listing personal property valued at $11,942.00, and subsequently, on January 11, 1943, filed a personal claim of $7,174.60 against said estate for services alleged to have been performed by him under an agreement with his 76 year old, invalid mother prior to her death, which agreement pertained to the management of her individual estate and her life estate in the property of her deceased husband, James A. Green, of whose estate Herschel S. Green was then both Executor and Testamentary Trustee.

17. That for a period of upwards of 14 years, Herschel S. Green, as Executor of the Estate of Martha Green, De-

ceased, made no accounting whatsoever to said County Court, and the aforesaid personal claim, the only claim filed, was never noticed for hearing, continued, or ever allowed by said County Court during such period.

18. That immediately after the death of Martha Green on April 9, 1942, Herschel S. Green transferred her entire bank account to a new trustee's bank account, and thereafter caused all of the receipts and disbursements concerning her estate to pass through such designated trustee's bank account, and no other account, thus conclusively indicating his unequivocal election to act as testamentary trustee, and not as executor of said estate, a choice open to him under *Illinois* law.

19. That the verified reports filed in the United States District Court by Herschel S. Green, as trustee, on which the aforesaid accounting before the Master in Chancery was had, and the identical reports subsequently filed in the said County Court on February 25, 1957, three days before the last Notice of Appeal was filed in this cause, unquestionably included the avails from the subsequent sale of personal property listed in the aforesaid original inventory filed August 25, 1942 in said County Court, further indicating an election on the part of Herschel S. Green to act as testamentary trustee, and not as executor.

20. That, indicative of the general practice of petitioners throughout this litigation, on July 16, 1956, just nine days after the findings of fact and conclusions of law of the aforesaid Master in Chancery, was filed, and approximately 14 years after Herschel S. Green filed the aforesaid original inventory, during which time he performed no act as executor, Herschel S. Green, as Executor of the Estate of Martha Green, Deceased, wilfully filed a false and fraudulent verified Supplemental Inventory in said County Court.

21. That said Supplemental Inventory listed only an alleged interest in certain lands which Herschel S. Green then personally knew did not belong to the Estate of Martha Green, Deceased.

22. That said Supplemental Inventory was solely designed as a device to comply with certain *Illinois* statutes to enable Herschel S. Green to subsequently file a second patently false personal claim of $40,512.21 against said estate.

23. That petitioners state such second personal claim of $40,512.21 was filed in the said County Court against the Estate of Martha Green, Deceased, on August 29, 1956, after the accounting order was entered in the District Court (Motion, Par. 1), indicating conclusively that after 14 years, such personal claim of Herschel S. Green was deliberately and solely designed and filed merely as a frantic device to off-set the aforesaid judgment on accounting rendered against him, and for no other reason.

24. That in addition to such aforesaid second personal claim of $40,512.21, Herschel S. Green belatedly claimed to individually own an undivided ½ of all personal property contained in an additional Amended Inventory, filed by him on November 23, 1956, which in other respects is identical to his original inventory filed August 25, 1942, as Executor of the Estate of Martha Green, Deceased.

25. That whatever claimed justice is involved in petitioners' cause must of a necessity be solely predicated upon and represented by the aforesaid two personal claims filed by Herschel S. Green in said County Court, because Herschel S. Green has already in the guise of testamentary trustee personally withdrawn all of the net income of both trust estates since 1942 as aforesaid.

26. That petitioners say the two personal claims filed by Herschel S. Green are now pending in the said County Court, to be determined by such court on May 17, 1957 (Motion, Par. 4, 5), but neglect to disclose the fact, known to them, that before they mailed their Motion and Petition for Writ of Certiorari to the Supreme Court of the United States, both of such personal claims were denied and ordered stricken by said County Court, as well as said fraudulent Supplemental and Amended Inventories filed by Herschel S. Green, and he was ordered to promptly file a proper final account limited to disclosing the disposition of assets contained in his said original inventory.

27. That the aforesaid decision of said County Court, rendered May 17, 1957, unquestionably resolves all questions as to any claimed right to justice in petitioners' cause, and it is hoped should end the vexatious litigation wrongfully continued by them without further expense to respondents.

WHEREFORE, respondents respectfully move this Honorable Court to dismiss the aforesaid Motion of petitioners, and grant petitioners, if necessary, sufficient time to file trial court record.

Dated this 31st day of May, A. D. 1957.

OSCAR L. GREEN, ROBERT A. GREEN, QUENTIN L. GREEN and ALICE GREEN, *Respondents*,
By. AUGUST F. BRANDT,
363 St. Clair Avenue,
Grosse Pointe 30, Michigan,
JACKSON R. HUTTON,
408 First National Bank Bldg.,
Danville, Illinois,
Attorneys for Respondents.

State of Michigan,
County of Wayne—ss.

August F. Brandt, first duly sworn, on oath deposes and says that he has read the foregoing Answer, and that he believes the matters and things therein stated to be true and correct on his information and belief, and that this Affidavit is being made on behalf of the respondents.

(Signed) August F. Brandt.

Subscribed and sworn to before me, a Notary Public in and for said County, this 31st day of May, A.D. 1957.

(Signed) Shirley C. Hahn,
Notary Public, Wayne
County, Michigan.

My Commission expires: March 30, 1958.

(Seal)

Office - Supreme Court, U.S.
FILED
JUN 14 1957
JOHN T. FEY, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1956

No. 1014

HERSCHEL S. GREEN and MADGE GREEN,
Petitioners,

v.

OSCAR L. GREEN, ROBERT A. GREEN,
QUENTIN L. GREEN and ALICE GREEN,
Respondents.

RESPONDENTS' BRIEF WITH APPENDIX

AUGUST F. BRANDT
363 St. Clair Avenue,
Grosse Pointe 30, Michigan,
JACKSON R. HUTTON,
408 First National Bank Bldg.,
Danville, Illinois,
Attorneys for Respondents.

MOERS, INC., 905 HENRY ST., DETROIT, MICH.

INDEX

	Page
Counter-Statement of Facts	1-10
Summary of Argument	11-13
Argument	14-31
I. Illinois county courts in probate have no jurisdiction of trust estates, nor of the trustees. An executor has no interest in title to, or control over the realty of his decedent, or the income therefrom	14-20
II. Diversity of citizenship exists between all indispensable parties of the case	20-26
III. A petition to vacate a judgment pursuant to Rule 60(b) of the Federal Rules of Civil Procedure is addressed to the sound legal discretion of the trial court	26-29
IV. A trust estate may be lawfully required to bear the necessary expenses of its own preservation, including reasonable attorney fees, as were fairly earned in effecting the result indicated by the final decree	29-31
Conclusion	32
Appendix:	
Decree of the County Court of Crawford County, Illinois, dated May 17, 1957, In the Matter of the Estate of Martha Green, Deceased	33-35

INDEX OF CITATIONS

Cases

	Page
Atwood v. Rhode Island Hospital Trust Co., 275 F. 513, 518	23
Baltimore & Ohio R. Co. v. Chicago River & I.R. Co., 170 F. 2d 654, 658	23
Board of Education of Chicago v. Crilly, 312 Ill. App. 16, 37	19
Burdick v. Powell Bros. Truck Sales. 124 F. 2d 694, 695	28
Central Railroad v. Pettus, 113 U.S. 116, 124	30
Chicago T & Tr. Co. v. Fine Arts Bldg., 288 Ill. 142, 159	18
Colley v. Wolcott, 187 F. 595	30
Cornwall v. Cornwall, 118 F. 2d 396, 398	27
Cummings v. Lohr, 246 Ill. 577, 581	24
Dixon v. Nefstead, 285 Ill. App. 463, 469	16
Elgin Nat. Watch Co. v. Barrett, 213 F. 2d 776, 780	26
Erie Railroad Co. v. Tompkins 304 U.S. 64	25
First Nat. Bank of Colorado Springs v. McGuire, 185 F. 2d 620	28
Goohenour v. Cleveland Terminals Bldg. Co., 142 F. 2d 991, 995	30
Grace v. Seibert, 235 Ill. 190, 193	18
Green v. Grant, 143 Ill. 61	25, 26
Green v. Green, 218 F. 2d 130	1, 3, 5, 6, 19, 20, 27
Green v. Green, 233 F. 2d 642	1, 7, 21, 27
Guaranty Trust Co. of N.Y. v. York, 326 U.S. 99	25
Harris v. Chicago Great Western Ry. Co., 197 F. 2d 829, 832	31
Hart & Smith v. Dime Savings & Trust Co., 214 Ill. App. 553, 556	15

	Page
Hoblit v. Howser, 338 Ill. 328, 332	24
Howard v. Swift, 356 Ill. 80	15
Independence Lead Mines Co. v. Kingsbury, 175 F. 2d 983	26
In Re Detroit International Bridge Co., 111 F. 2d 235	31
In re Estate of Busby, 288 Ill. App. 500, 528	15
In re Estate of Mortenson, 248 Ill. 520, 527	15
In re Estate of Nonnast, 300 Ill. App. 537, 557	18
In re Estate of Shanks, 282 Ill. App. 1	15
In re Green, 8 Ill. 2d 264	1, 7, 29
Jones v. Bryant, 204 Ill. App. 609, 617	23
Jones v. Jones, 217 F. 2d 239, 241	27
Kingsley v. Montrose Cemetery Co., 304 Ill. App. 273, 282	25
Lamar v. Hall, 129 F. 79	30
May v. Midwest Refining Co., 212 F. 2d 431, 440	31
McGovern v. McGovern, 268 Ill. 135	25
Montgomery v. Equit. Life Assur. Soc., 83 F. 2d 758, 762	25
McFall v. Kirkpatrick, 236 Ill. 281	26
Nonnast v. Northern Trust Co., 374 Ill. 248, 259	18
Nott v. Heitman Trust Co., 285 Ill. App. 450	16
Peck v. Landphere, 238 Ill. App. 567	15
Pergament v. Kaiser-Frazier Corp., 224 F. 2d 80	31
Perrin v. Aluminum Co. of America, 197 F. 2d 254, 255	26
Poole v. Rutherford, 336 Ill. App. 516	29
Rosen v. Hayes, 271 Ill. App. 1	15-16
Rosen v. Rosen, 370 Ill. 173	15
Smith v. Preston, 170 Ill. 179, 188	18
Talent v. Talent, 267 Ill. App. 334	16
Temple v. Scott, 143 Ill. 290	26
Trustees v. Greenough, 105 U.S. 527, 532, 533	29, 30, 31

Page

U.S. v. Equitable Trust, 283 U.S. 738 30
Warner v. Mettler, 260 Ill. 416 22
Wylie v. Bushnell, 277 Ill. 484 15
Young v. Garrett, 149 F. 2d 223 228 21

Statutes

Illinois Principal and Income Act (1941) SHA Ch. 30, Sec. 14, Part 2 29
Chapt. 3, sec. 366a, Ill. Rev. Stats. 1949 17

Rules and Codes

Rule 19(a) Federal Rules of Civil Procedure, 28 USCA 21
Rule 60(b) Federal Rules of Civil Procedure, 28 USCA 9, 12, 26, 27

Textbooks and Digests

Federal Digest, Vol. 31D, Federal Civil Procedure, sec. 2645 26
24 C.J., Executors & Administrators, p. 52, note 26 19
33 C.J.S., Trusts, sec. 191 19
90 C.J.S., Trusts, sec. 241 19
Scott on Trusts (1939), Vol. 2, sec. 214, p. 1144 24